

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs June 27, 2006

TREVIS O. LOVE v. STATE OF TENNESSEE

Appeal from the Criminal Court for Greene County
No. 05CR194 James E. Beckner, Judge

No. E2005-02337-CCA-R3-PC - Filed July 27, 2006

The petitioner, Trevis O. Love, appeals the Greene County Criminal Court's summary dismissal of his petition for post-conviction relief from his guilty pleas to sale of one-half gram or more of cocaine, a Class B felony, possession with intent to sell or deliver one-half gram or more of cocaine, a Class B felony, and simple possession of marijuana, a Class A misdemeanor, and resulting effective sentence of eight years to be served as a Range I, standard offender in the Department of Correction. He contends that the trial court erred in dismissing his petition for post-conviction relief which was filed beyond the one-year statute of limitations. We affirm the trial court's summary dismissal of the petition for post-conviction relief.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

JOSEPH M. TIPTON, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and ROBERT W. WEDEMAYER, JJ., joined.

Greg W. Eichelman, District Public Defender, for the appellant, Trevis O. Love.

Paul G. Summers, Attorney General and Reporter; Jennifer L. Bledsoe, Assistant Attorney General; C. Berkeley Bell, Jr., District Attorney General; and Eric D. Christiansen, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

This case involves the summary dismissal of the petitioner's petition for post-conviction relief. The record reflects that the petitioner entered his guilty pleas on January 24, 1994. The trial court sentenced the petitioner to eight years on each of the cocaine convictions and to eleven months and twenty-nine days for the marijuana conviction. The trial court ordered the sentences to be served concurrently for an effective sentence of eight years in incarceration. The petitioner appealed a certified question of law to this court, but the convictions were affirmed. See State v. Travis Love

and James Lee, No. 03C01-9406-CR-00205, Greene County (Tenn. Crim. App. Feb. 18, 1997), app. denied (Tenn. Nov. 3, 1997).¹

On June 27, 2005, a letter submitted by the petitioner was filed with the trial court. The trial court treated the letter as a petition for post-conviction relief. The petitioner alleged that his guilty pleas were unknowing and involuntary and that he received the ineffective assistance of counsel. The petitioner alleged that he was convicted of “drug conspiracy” in federal court on November 3, 2004, and that his 1994 Greene County convictions were used to enhance his federal sentence from ten to twenty years. The petitioner asserts that on November 30, 2001, his supervision by the Department of Correction ended and that he “started the process for filing to get [his] rights as an American Citizen back.” He asserts that he did not find out his convictions had not been expunged until three years later in November 2004. The trial court appointed counsel to represent the petitioner in his post-conviction claim on June 30, 2005.

The trial court found that the petitioner entered his guilty pleas in 1994, that his petition for post-conviction relief was not filed until June 27, 2005, and that the petition was barred because it was filed too late. It also found that “[n]o facts are alleged that would allow the petition to be filed after the expiration of one year and no facts are alleged that would cause the statute of limitations to be tolled.” The trial court dismissed the petition without a hearing.

The petitioner acknowledges filing his petition beyond the statute of limitations for post-conviction relief. However, he contends that due process considerations must toll the limitations period. He contends he is entitled to post-conviction relief because (1) he was forced to plead guilty to charges involving drugs found in a co-defendant’s possession; (2) his attorney told him that he would go to boot camp, that the court was in agreement that he would be “eligible for pre-trial diversion,” and that his convictions would be expunged upon completion of his sentence; (3) he only pled guilty to case number 11476 but the guilty plea form incorporates case number 11351; (4) the lab results in his case included drugs not listed in the indictments; and (5) his attorney pursued an appeal on a certified question of law without the petitioner’s knowledge or consent. He asserts he completed his sentence in the Department of Correction on November 30, 2001, without any violations. He also asserts he has proof regarding all of the allegations in his petition. He insists that further development of the record is necessary to determine the circumstances surrounding his guilty pleas and asks for an evidentiary hearing.

The state responds that the trial court properly dismissed the post-conviction petition as time-barred because the petitioner filed his petition more than seven years after the Tennessee Supreme Court denied his application for permission to appeal. The state contends that none of the exceptions under Tennessee Code Annotated section 40-30-202 apply to allow the untimely post-conviction claim. The state argues the record supports the post-conviction court’s findings that no facts were alleged which would have allowed the petition to be filed late or to cause the statute of limitations

¹ The name used in the petitioner’s direct appeal and on the judgment forms is Travis Love. However, the name signed by the petitioner in his post-conviction petition, the notice of appeal, and the indictments is Trevis Love.

to be tolled. It also argues that due process does not require the tolling of the statute of limitations on account of counsel's conduct.

The Tennessee Post-Conviction Procedure Act specifies that

a person in custody under a sentence of a court of this state must petition for post-conviction relief under this part within one (1) year of the date of the final action of the highest state appellate court to which an appeal is taken or, if no appeal is taken, within one (1) year of the date on which the judgment became final, or consideration of such petition shall be barred. The statute of limitations shall not be tolled for any reason, including any tolling or saving provision otherwise available at law or equity.

T.C.A. § 40-30-102(a). A trial court may enter an order summarily dismissing a post-conviction petition if the petition is not filed within the time set forth in the statute of limitations. T.C.A. § 40-30-106. If a petitioner files a petition for post-conviction relief outside the one-year statute of limitations, a court may still consider the petition if (1) a new constitutional right has been recognized; (2) the petitioner's innocence has been established by new scientific evidence; or (3) a previous conviction that enhanced the petitioner's sentence has been held to be invalid. T.C.A. § 40-30-102(b). A court may also consider an untimely petition for post-conviction relief if applying the statute of limitations would deny the petitioner due process. Burford v. State, 845 S.W.2d 204, 209-10 (Tenn. 1992).

Due process concerns may require the statute of limitations to be tolled if a petitioner shows that misrepresentations made by counsel deprived the petitioner of a reasonable opportunity to seek post-conviction relief. Williams v. State, 44 S.W.3d 464, 471 (Tenn. 2001). However, due process requires a weighing of the petitioner's liberty interest against the state's interest in preventing the litigation of stale and fraudulent claims. Sample v. State, 82 S.W.3d 267, 273-74 (Tenn. 2002). To determine if due process requires tolling of the statute of limitations, our supreme court has provided a three-step test:

- (1) determine when the limitations period would normally have begun to run;
- (2) determine whether the grounds for relief actually arose after the limitations period would normally have commenced; and
- (3) if the grounds are "later arising," determine if, under the facts of the case, a strict application of the limitations period would effectively deny the petitioner a reasonable opportunity to present the claim.

Sands v. State, 903 S.W.2d 297, 301 (Tenn. 1995).

In applying the first step of the analysis, we note that the final action to the highest appellate court occurred on November 3, 1997. Therefore, the petitioner had until November 3, 1998, to file a timely post-conviction petition. In applying the second step of the analysis, all of the petitioner's alleged grounds for relief arose at the time of his guilty pleas or before the final action to the highest appellate court, with the exception of the allegation that the petitioner's attorney told the petitioner that the convictions arising from his guilty pleas would be expunged upon completion of the petitioner's sentence. The petitioner would have no knowledge that his convictions were not expunged until after his supervision by the Department of Correction ended on November 30, 2001. Therefore, this single claim could be considered "later arising."

In addressing the last step of the analysis, we first note that we may take judicial notice of the record of the petitioner's direct appeal. State ex rel. Wilkerson v. Bomar, 213 Tenn. 499, 505, 376 S.W.2d 451, 453 (1964). In this regard, we also note that the record in the petitioner's appeal of the certified question of law is devoid of any mention of the expungement of convictions being part of the petitioner's plea agreement. That record shows that when asked by the trial court, "Do you understand that if you're convicted of any crime in the future that these convictions can be used to enhance or make that punishment greater," the petitioner responded, "Yes, sir." When asked by the trial court if any promises were made, other than the agreement with the state, the petitioner responded, "No." The trial court announced the plea agreement, which did not include any agreement to expunge the convictions in the future, and the defendant confirmed the agreement.

Secondly, we note that the petitioner asserted that he began "the process for filing to get [his] rights back as an American Citizen" upon his release from the Department of Correction's supervision on November 30, 2001, indicating that the petitioner was aware the convictions were on his record and had not been expunged at that time. The petitioner waited until June 27, 2005, approximately three and one-half years later, to file his petition for post-conviction relief. The petitioner asserts he did not become aware that his convictions were not expunged until November 2004, when he was convicted in a federal drug case. However, mere lack of knowledge that a claim exists does not toll the statute of limitations. State v. Brown, 928 S.W.2d 453, 457 (Tenn. Crim. App. 1996); see also Jason Earl Hill v. State, No. E2005-00968-CCA-R3-PC, Hamilton County, slip op. at 5 (Tenn. Crim. App. Feb. 16, 2006) (concluding that petitioner's lack of knowledge does not toll the statute of limitations when petitioner argued that he did not discover his claim for relief until the conviction was used to enhance a subsequent federal sentence); Howard Templeton v. State, No. 01C01-9406-CC-00220, Warren County, slip op. at 3 (Tenn. Crim. App. Jan. 5, 1995) (concluding that although the petitioner did not learn his attorney had misinformed him about his release eligibility date until after the statute of limitations for post-conviction relief had expired, the petition was time-barred). From the record and his request for relief, we believe the petitioner had a reasonable opportunity to seek post-conviction relief after his sentence ended in November 2001 and he began the process "to get [his] rights as an American Citizen back." We conclude that the trial court did not err in dismissing the petition as untimely and that the petitioner is not entitled to relief.

CONCLUSION

Based on the foregoing and the record as a whole, we affirm the judgment of the trial court.

JOSEPH M. TIPTON, JUDGE